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FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Title 28, Section 1257 (3) United States Code.

IN THE
SUPREME COURT OF THE UNITED STATES

NO.

PHILLIP LUTHER,
PETITIONER

vs.

STATE OF ALABAMA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Phillip Luther, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court to review the judgment of the Court of Criminal Appeals of the State of Alabama rendered on January 11, 1972, which affirmed the conviction and four year sentence of the Petitioner by a jury in the Circuit Court of Marshall County, Alabama, for the crime of arson. An application for Rehearing in the Court of Criminal Appeals of the State of Alabama was subsequently denied.

A petition for writ of certiorari in the Supreme Court of the State of Alabama was denied on March 30, 1972.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of the State of Alabama is reported in So. 2d (1972), and is set forth in Appendix A, *Infra.*, at p.p. A-1, A-9, and submitted herewith in support of the instant opinion.

The Court of Criminal Appeals of the State of Alabama rendered no opinion on rehearing.

The Supreme Court of Alabama rendered no opinion in its order denying the Petition for Writ of Certiorari to the Court of Criminal Appeals of the State of Alabama.

JURISDICTION

Jurisdiction to review this case upon Writ of Certiorari is conferred upon this Court by Title 28, United States Code, Section 1257 (3) in that a right secured under the Constitution of the United States is under consideration.

QUESTION PRESENTED

(1) Does the selection of a private attorney to prosecute a defendant against whom he is a biased partisan with a concomitant surrendering of all control of the case to him by the public prosecutor violate the fundamental concepts of due process so as to vitiate a consequent conviction of such a defendant?

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provision is that part of the Fourteenth Amendment, Constitution of the United States, Section 1, which states:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . .

STATEMENT

The Petitioner, a successful businessman (pharmacist)

in Boaz, Alabama was indicted for second degree arson in that he supposedly burned down one Wilson's discount store, an alleged competitor located almost immediately adjacent to his own premises. Petitioner was convicted of setting the August 27, 1969 fire and sentenced to four years in the penitentiary. The whole case against Luther was premised almost entirely on the testimony of one Scott who claimed to have aided and abetted the Petitioner in burning the store in question. The other evidence adduced by the State was weak and circumstantial, being primarily used to corroborate to some degree the testimony of Scott which is required under Alabama law. (See Title 15, Sec. 307, Code 1940).

The sole issue raised here relates to the amazingly unique and outstandingly prejudicial procedure followed by the State District Attorney in attempting to secure Petitioner's conviction (successfully).

It seems that on the day of the trial, January 12, 1970, in Albertville, Alabama, two special or private prosecutors, *viz.*, Clark Johnson and Terry Huffstuttler, Jr., appeared for the State. The record is, of course, silent as to what, if any, role they played during pre-trial proceedings. Mr. Johnson, took the lead role in the case with Mr. Huffstuttler providing only minor assistance.

It then developed during the two day trial that Mr. Johnson was the Attorney for the self-styled accomplice who testified so successfully against the Petitioner and that he had been representing Scott from the moment of his arrest on the same arson charge which Petitioner was defending against. Of course, it was also developed that at the time of his giving testimony (elicited by Mr. Johnson) the "accomplice" Scott's case was not yet disposed of, presumably he was to be to some extent the beneficiary of additional consideration from the State in return for his *and* Mr. Johnson's help in convicting the Petitioner.

A careful reading of the record, however, discloses an even more unusual circumstance in that, we respectfully

submit, the State's Attorney never even appeared in the Court as a participant at all. There are some mechanical recitations in the minute entry as to Mr. Conway's, (the State Prosecutor) physical presence at the proceedings, but the trial transcript belies any such conclusion since the State's Attorney never reportedly spoke a syllable and all inquiries by the Court to the *State* relative to stipulations, agreements, etc., were directed toward Mr. Johnson or rarely Mr. Huffstuttler. In point of fact, the State's Attorney never appeared at all prior to the jury verdict.

Furthermore, the record is silent as to who, if anyone, requested Mr. Johnson's services (or Mr. Huffstuttler's). The trial court certainly acquiesced in their handling the case in its entirety, but no formal selection or invitation can be found in the record by Petitioner. There was no mention of the private prosecutors in the Court's oral charge to the jury.

It was developed from the accomplice Scott under close questioning by his attorney (the prosecutor) that he had made some statement to the police after his arrest and the defense elicited the fact that he (Scott) had called his lawyer, Mr. Johnson, immediately after being arrested and that Johnson was still his lawyer.

What, if any, proffers of beneficial evidence may have been made or settlement offers, or negotiations of any kind by the private prosecutors is not found in the record. It is clear in the record that the Petitioner's conviction was obtained by virtue of a cooperative effort on the part of Attorney Johnson and his client-witness Scott. Furthermore, the record is necessarily silent as to whether or not the *State* prosecutor had ever talked with the witness Scott or whether Johnson had secured any pretrial information as a prosecutor which he was precluded from divulging because of his attorney-client relationship with Scott. Moreover, District Attorney Conway did not, from the record, make himself available to discuss what, if any, benefits were accruing to Johnson and Scott for helping the State so thoroughly.

In summary, the record shows a completely private lawsuit principally between Mr. Scott represented by Mr. Johnson and aide and Mr. Luther represented by his attorneys. Moreover, it seems undisputable that the record suggests the best reason imaginable for Mr. Johnson to secure a conviction at all costs, i.e., Mr. Scott's potential freedom. There is no questioning the prosecutor's skilled effectiveness in achieving his result. Many of his questions contained what the jury may well have felt to be personal factual knowledge gathered by him as Scott's lawyer, but which he could not or would not elicit as proper testimony.

The Alabama Court of Appeals, in the exercise of its statutory duty to search the entire record for errors (specific assignments are not required in Alabama) did not comment with respect to the factual matter heretofore set out.

REASONS FOR GRANTING THE WRIT

Whenever and wherever a defendant in this country is convicted of a felony and threatened with lengthy imprisonment in a manner and under circumstances which constitute a wanton violation of the most fundamental concepts of due process by a State, then, of course, a primary ground for relief from this Court is established. But when, as here, the action complained of is one which if left unredressed might conceivably spread to such an extent as to infect in like manner countless similar proceedings throughout the South and nation, then action by this Court is desperately called for.

It is respectfully submitted that in this country the control of criminal prosecution has been taken from private hands, and transferred to public functionaries chosen for that express purpose. In England, of course, criminal prosecutions were as a rule carried on by individuals interested in the punishment of the accused and not by the public, but under our Constitution (the due process clause in particular) it has always been true that public prosecutions *must* be conducted by the proper official representative of the State, and *must not* under any circumstances be placed under the *entire*

management and control of private parties or their attorneys. Certainly, there is little question as to the propriety of allowing an interested counsel to aid a prosecutor in a prosecution, where the latter *has absolute control over the case and stands affected by no other motive than that of securing the punishment of guilt.* But it equally and constitutionally certain that when such assistants are employed in the case:

> "The state attorney should always remain present at the trial, and see that a public prosecution for a criminal offense does not degenerate into a private persecution, and that the administration of the criminal law is not made a vehicle of oppression for the gratification of private malice, or the accomplishment of private gain or advantage."
>
> THALHEIM V. STATE, 33 Fla. 169, 20 So. 938 (1896). See also, STATE V. KENT, N.D., 62 N.W. 631 (1895) for a general discussion.

In summary, we submit that under the Due Process Clause of the Fourteenth Amendment a public prosecution must never be under the *entire* control of private parties (with some bias), even though members of the bar may in proper cases *assist* in spite of having been retained by private parties. See OGLESBY V. STATE, Fla., 90 So. 825 (1922).

In the instant cause, however, the following factors coalesced:

1. Two private prosecutors were retained and appeared for the State of Alabama.
2. One of the private prosecutors, who took the lead in all matters of any consequence, was not only representing the defendant's alleged accomplice at the time of the trial but also produced him as *the* witness against the accused and occasioned his conviction.
3. Moreover, it was made obvious from the questioning by this private prosecutor (Johnson) of many witnesses that he was probably privy to much information relative to the defendant's guilt

from having conversed with his client, the alleged accomplice and sole witness as to direct evidence of the defendant's supposed guilt.

4. It was also shown that at the time of the accused's trial the client-witness of prosecutor Johnson had not himself been tried but charges were then pending.

5. Not only did the District Attorney not control the proceedings, it is respectfully submitted that he was not even present at the trial. This fact is true and made patently obvious from even a casual reading of the trial transcript in spite of a routine statement to the contrary in a minute entry prepared by the Clerk.

In other words, the defendant's fate was placed almost solely in the hands of an attorney whose client would without question benefit greatly from a conviction of the accused. Phillip Luther, the defendant-petitioner, was arbitrarily placed in a position where he had to rely on a person who owed a direct, professional and confidential loyalty to the only material witness against him for whatever disclosures of beneficial evidence to which he was entitled.

The authorities, Federal and State, are uniform in condemning absolutely such a state of affairs.

In FLEGE V. STATE, Neb., 142 N.W. 276, the Nebraska Supreme Court found that where, in a criminal prosecution, an application is made to the trial court for the appointment of an *assistant* prosecutor, no attorney should be appointed who is known to be a partisan against the accused and who was theretofore employed and paid by another suspected person, and for whom he had appeared in the preliminary examination and in a former trial of the accused, taking an active part in both for the protection of his suspected client. That Court said in part:

"It is impossible to conceive of an attorney, after having served as he had and for the purpose for which he had been employed, to enter upon the trial

> with the single purpose of impartially seeking to know the truth, protecting the rights of the defendant, and seeing that they were maintained, if need be, at all hazards. *Not only this Court, but all Courts*, have so clearly stated the judicial duties of a public prosecutor as to leave no room for doubt as to the entire impartial attitude of a prosecutor so as to leave no room for question upon this point." (emphasis added).

The Court went on to conclude most significantly that:

> "It must appear to the mind at once that the appointment of a partisan special prosecutor *was not in the interest of the fair and impartial trial guaranteed by the Constitution.*" (emphasis added).

Neither have the Federal Courts been silent on the matter complained of. In GRANGER V. PEYTON, 379 F.2d 709 (1967) the Fourth Circuit Court of Appeals held unequivocally that a prosecuting attorney's prosecution of a criminal case at the same time he was representing the accused's wife in a divorce proceeding based upon the same alleged assault rendered the conviction obtained *constitutionally invalid for violation of the requirement of fundamental fairness assured by the due process clause.* The Court said approvingly that:

> "At common law, a prosecuting attorney is the representative of the public in whom is lodged a discretion which is not to be controlled by the Courts *or by an interested individual.*" (emphasis theirs). See also, UNITED STATES V. BROKAW, 60 F. Supp. 100 (S. D. Ill. 1945).

This Court has clearly acknowledged that the action of prosecuting officers on behalf of the State may constitute State action within the purview of the Fourteenth Amendment. See MOONEY V. HOLOHAN, 294 U.S. 103, 55 S. Ct. 340, 79 L.ed. 791 (1935).

Perhaps the rule we seek this Court to formally approve, was most succinctly set out by the Oklahoma Appellate Court in STEELEY V. STATE, 17 Okla. CR. 252, 187 Pac. 821 as follows:

> "Such an officer is acting in a quasi judicial capacity, and he and those associated with him should represent public justice and stand indifferent as between the accused and any private interest...
>
> . . . showing conclusively that he was not an impartial, quasi judicial officer in the prosecution as is contemplated by law. True, no objection was made at the trial to Mr. Martin's participation in the case as a special prosecutor, but the error we think is one this Court should consider, even though no objections were made."

We conclude by saying whenever, as here, District Attorneys turn over complete control of prosecutions to private attorneys with a vested and powerful interest in convictions only, the accused person loses one of his most valuable constitutional safeguards under our system, viz., the fair, impartial, duty-bound adversary whose primary interest is justice. Such a loss cannot be tolerated and such convictions cannot be allowed to stand.

CONCLUSION

For the reasons asserted, it is respectfully submitted that the Petitioner's conviction should be set aside and a new trial afforded in full accord with the requirements of due process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a copy of the above and foregoing has this date, postage prepaid, been mailed to the Honorable William J. Baxley, Attorney General for the State of Alabama, at his office, Administrative Building, Montgomery, Alabama.

DATED this the day of July, 1972.

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THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1971–72

8 Div. 75

Phillip Luther
v.
State

Appeal from Marshall Circuit Court

PRICE, PRESIDING JUDGE

The indictment charged Phillip Luther with second degree arson in the burning of Wilson's Discount Store, the property of Betty and Eugene Wilson. Defendant was convicted and sentenced to the penitentiary for four years.

The state's evidence disclosed that Wilson's Discount Store, in Boaz, and a drug store owned by defendant were situated about 150 feet apart with an alley way running behind both stores.

The testimony of state's witness Eddie Scott was substantially as follows: Scott, 23 years old, resides in Boaz. He has known defendant for ten years and has worked for him. They have visited in each other's homes and have made trips together. Defendant has loaned him money and they have engaged in joint projects.

The defendant operates Phil's Pharmacy. It is a regular drug store with a prescription department, health and beauty aids department and soda fountain. Eugene Wilson operates a discount health and beauty aids store under the name Wilson's Discount Store. Scott is not acquainted with Mr. Wilson and has never had any differences of any kind with him.

Prior to the fire on August 27, 1969, the defendant made statements that Wilson's Discount Store was "dipping in on his business" and that something was going to happen to them.

On August 27, 1969, Scott went to Phil's Pharmacy about four o'clock in the afternoon. Nothing unusual happened at that time. Around 7:15 he went back to defendant's store. On this occasion defendant showed him a half-gallon glass container of gasoline and a smaller container with a firecracker taped to it. He also showed him three plastic one-gallon jugs and one glass one-gallon jug, and said he wanted to show him "something else." They went into the alley behind the store where defendant showed him a garbage can that was "smoked up" inside, and told him he had tried an experiment and it worked. Defendant said he had put a lighted cigarette on the end of a firecracker and it would burn down and ignite the firecracker.

Defendant gave him some money and told him to take the gallon containers to a service station and fill them with gasoline, but witness suggested it would be less obvious to siphon gasoline from defendant's car. Defendant said, "tonight's the night" and gave him a rubber hose, which he put in the box with the jugs, and a package of cigarettes. This was about 7:30, closing time. They put the containers and other materials in defendant's station wagon, and left in separate vehicles for Scott's father's home.

Witness and defendant had plans to use his father's shop to do painting on a dune buggy they were building together, but they left after a short time and went to defendant's home, traveling in defendant's station wagon. While defendant was eating supper witness filled the four jugs by siphoning gasoline from the station wagon. They went back to witness's shop, arriving there about 9:00 P.M. After working on the dune buggy for about an hour they left the shop and went to a laundromat where each drank a soft drink; while there they took the two-ounce container to which the firecracker was attached and taped it to a half-gallon container of gasoline. They then drove to Broad Street where witness got out of the automobile at the alley. Witness took the box with four gallon jugs, three plastic and one glass, a half gallon container, a small bottle and a firecracker and placed it about

three feet from a hole under Wilson's store. The gallon jugs were the kind in which syrup for a soda fountain is purchased. After placing the box by the hole, witness went to the post office. When he came out of the post office he went back to the alley and tried to conceal the box containing the jugs, by piling cardboard boxes on them. He then went out the other end of the alley and saw a police car coming from Broad Street on to Mill Street. He crossed the street and went to the front of Phil's Pharmacy. The police car stopped at the traffic light and witness walked over to the car. He told the police he had left his key to the drug store at home and asked for a ride home to get it. About this time defendant pulled up behind the police car and he told them defendant had a key. The police car left, witness and defendant went inside and pretended to clean the store. About five minutes later the police car came by again, but left. The witness and defendant left the drug store, taking with them a set of two-way radios. The witness also carried a mop and mop bucket outside. He stayed at the corner while defendant went into the alley behind Wilson's. While witness was at the corner Trey Corley came by and spoke to him. Defendant was gone about five minutes and when he came back they went back in the drug store and stayed about ten minutes.

After leaving the drug store they went back to the shop and put the wheels on the dune buggy. At this point they heard the fire sirens. They went to defendant's house, witness driving the dune buggy, defendant in his station wagon and showed the dune buggy to defendant's wife. Defendant drove witness back to the shop where witness picked up his car and they met at Moore's Laundry. From there they drove toward town in the witness's automobile. After about two blocks they turned around. They could see a flashing red light. The witness then drove back to the laundry and picked up his car.

Witness drove through town on his way home and saw several people standing close to the alley on Mill Street. He saw smoke and a fire truck in the alley. When he arrived at

home he telephoned defendant and told him Wilson's was on fire and suggested that he come by and pick him up and go look at the fire. Defendant came to his house but they didn't go to the fire.

On cross examination the witness stated he had worked for defendant off and on for about two years and had quit under good circumstances. There is another drug store within one half block of defendant's store that has a pharmacy and there are ten cent stores and other type stores in the vicinity. Wilson's does not have a pharmacy. Defendant never mentioned that any of these stores were getting any of his business, but had mentioned a store in Albertville as competing with him. Defendant didn't ask him to burn Wilson's store and didn't offer him any money to burn it.

The defendant testified Scott was at his store around 4:00 P.M., for a short time and returned around 7:30, closing time. They drove to Scott's father's home, left Eddie's car and proceeded to defendant's home, arriving there about ten minutes before 8:00. Scott watched television while defendant ate supper.

He and Scott left around 9:00 P.M., Scott driving the dune buggy and defendant driving his station wagon. They went to Moore's car wash and washed the dune buggy so it could be painted, after which they went back to Scott's shop and proceeded to work on the buggy until shortly after 10:00, when they went to defendant's drug store to get a Coca Cola because the weather was hot and they had been working. They did not stop at a coin-operated laundry.

While they were at the drug store Scott told him he was going to the postoffice to check his mail for a draft deferment. Scott was gone about 15 minutes. During this time defendant checked the front cash register and then walked to the corner to see if he could see Scott. When he didn't see him he locked the store, got into his car and drove to Bartlett Street looking for Scott. He made a circle, drove through the alley, but didn't see him and returned to the drug store. On his

return to the drug store he followed behind a police car. Defendant stopped for a traffic light after the police car passed through an intersection, and this delayed his return. When he approached his store he saw the police car stopped and saw Eddie Scott talking to its occupants. Defendant parked in front of his store and went inside. A few minutes later Scott came in and picked up the ash trays in the store and carried them to a garbage can on the corner. Defendant asked what he was doing and he said he was going to empty the ash trays. Defendant went back inside the store, picked up a small can of paint and went to the bathroom. After this he locked the store and the two of them drove back to the elder Scott's shop in defendant's station wagon. With the small can of paint defendant had picked up at the store they touched up some small places on the dune buggy. At around 11:30 P.M., they left the shop and drove to defendant's house, Scott driving the buggy. Defendant drove Scott back to his father's house and returned home, arriving there about ten minutes to twelve.

Defendant denied that he had anything to do with planning, preparation, or burning of the Wilson store and never mentioned burning it to Scott and had no knowledge of his taking an incendiary device behind Wilson's store; that he did not direct Scott to siphon gasoline from his car or give him a rubber hose or containers and Scott did not tell him he had siphoned the gasoline, and did not drop him off at the alley at Broad Street with the containers and incendiary device, and said he did not have a garbage or trash can at the back of his store. Some of the syrup used at the soda fountain comes in plastic cans and some in glass. The empty glass jars are sold and the plastic ones are thrown in a bin in the alley and are picked up by the garbage men.

When the state relies mainly on the testimony of an accomplice for a conviction of a felony, the statute (Title 15, § 307, Code 1940) prohibits a conviction unless the testimony of the accomplice, is corroborated by other evidence tending to connect the defendant with the crime. Whether

there is evidence to corroborate an accomplice is a question for the court. The credibility and weight of such evidence is for the jury. *Berry v. State*, 231 Ala. 437, 165 So. 97.

The corroborative evidence relied on by the state in this case is as follows:

Trey Corley testified that at 11:00 o'clock P.M., he saw Eddie Scott standing on the corner of Main and Mill streets, near Phil's Pharmacy, with a bucket in his hand, and what appeared to be a window washer, "looked like he had been washing windows." The witness said to him, "You're working a little late." Scott replied, "Yeah, but it's got to be done."

Floyd Samples, a member of the Boaz Police Department, with another policeman, was patrolling in a police car. About ten minutes before eleven he saw a person trotting in an alley in the vicinity of the B & W Store. This person called to them that he had forgotten his keys. The witness did not know the person at that time, but knows now that it was Eddie Scott. Scott said he had come to Phil's Pharmacy to get something. About that time a green station wagon pulled up behind the officers. Scott said it was Phil. The officers did not see anyone get out of the station wagon. The policemen left but came back shortly thereafter and saw Scott and another person in the drug store. Eddie Scott and Phil Luther came out of the store and Scott, in defendant's presence, said they were going to do some cleaning. Defendant did not say anything. At eleven minutes past eleven, when they were one block from the Pharmacy, the policemen received a radio call informing them of the fire. They went to Wilson's Discount Store. Cardboard boxes were burning and flames were as high as the building. After the fire was extinguished the witness went to defendant's drug store. He looked at the ash trays he had seen Scott with earlier and saw they still had ashes in them. He saw no other evidence of cleaning.

Edsel Whitten, a deputy sheriff, testified he looked in a garbage can in the back of Phil's Pharmacy. It was black inside, "like it has a fire in it."

James Ledbetter, a Boaz policeman, testified he heard an explosion similar to a firecracker and saw flames shoot up behind Wilson's Store, followed by another explosion. Residue of bottles and plastic jugs containing gasoline were removed from the fire.

In *Moore v. State*, 30 Ala. App. 304, 5 So. 2d 646, the following appears:

> "The entire conduct of the accused may be surveyed for corroborative circumstances and if from them his connection with the offense may be fairly inferred the requirement of the statute is satisfied. * * * The suspicious conduct of the accused may furnish sufficient corroboration of the testimony of the accomplice. (Citing cases)
>
> "Nor need such corroborative evidence be strong, nor sufficient of itself to support the conviction, the criterion being that it legitimately tends to connect the accused with the offense. (Citation)
>
> * * * * * * * * * * *
>
> "Under some circumstances proof of proximity and opportunity is held to be sufficient in corroboration of an accomplice." (Cases cited)

The defendant's association with Scott on the night in question, his proximity to the scene of the fire at the unseasonable hour, his suspicious conduct and opportunity to commit the crime, coupled with other evidence tending to connect him with the offense, was sufficient corroboration of the accomplice's testimony to justify submission of the case to the jury.

The following occurred during the direct examination of the state's witness Eddie Scott:

> "Q. Now, you said you made a statement to the police there in Boaz. Is that correct?
>
> "A. Yes, sir.
>
> "Q. Was that statement as detailed as the statement you've made here today?"

Defense counsel's objection was overruled, and the question was repeated:

> "Q. Was the statement you made to the police as detailed as the statement you've made here in court yesterday and today?
>
> "A. No, sir."

It is not competent to ask a witness if he had not made the same statement to others as now. *Smith v. State*, 103 Ala. 40, 16 So. 12.

Proof of statements made by a witness out of court is inadmissible to corroborate his testimony at trial. *Evans v. State*, 39 Ala. App. 498, 105 So. 2d 831.

In the instant case the witness' negative reply to the question could not have been harmful. Supreme Court Rule 45.

On direct examination state's witness Rachel Scott, the wife of Eddie Scott, testified that over a period of four or five months before the fire, defendant said that Wilson's was getting a lot of his business; that they might have a fire, the same thing might happen to them as happened to Gillespie's Drug Store. She was asked what happened to Gillespie's store and answered that it burned some time ago.

On cross examination she was again asked what happened to Gillespie's store. She replied that all she knew was they had a fire and that she didn't know what caused the fire. She was asked this question:

> "Q. And, as a matter of fact, it was found out by the Fire Marshall to be caused by a wire shortage – ."

The state's objection was sustained. Defendant argues in brief that the court's ruling deprived him of his right to rebut the testimony of this witness.

The court's ruling was proper. The witness had already said she didn't know the cause of the fire. Moreover, the ruling was not harmful. The defendant proved by the fire chief

that he investigated the fire at Gillespie's and determined that it was caused by defective wiring.

During the argument to the jury defense counsel stated: "Eddie Scott went down to the police station when they told him he was under arrest, and he took his lawyer, Mr. Clark Johnson, with him."

The state's objection, on the ground that "There is no evidence of that," was sustained.

The defendant argues that he had the right and duty to call to the jury's attention the fact that the special prosecutor, who conducted practically all of the trial for the state, is also the attorney for the accomplice and key state witness.

Objection to argument of counsel unsupported by the evidence is properly sustained. *Ray v. State*, 248 Ala. 425, 27 So. 2d 872; *Barddell v. State*, 144 Ala. 54, 39 So. 975.

There is no evidence in the record that Scott took his lawyer to the police station. Further, the jury's attention had already been directed to the fact that Mr. Johnson was Scott's attorney. Scott testified on cross examination the only person he took with him to the police station was his grandfather, but that he did not contact his attorney, who was Mr. Johnson.

AFFIRMED.

STATE OF ALABAMA – JUDICIAL DEPARTMENT
COURT OF CRIMINAL APPEALS

8th Div. 75

Phillip Luther
vs.
State of Alabama

Appeal from Marshall Circuit Court

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant and sureties on the appeal bond, pay the costs of appeal of this Court and of the Circuit Court.

STATE OF ALABAMA – JUDICIAL DEPARTMENT
COURT OF CRIMINAL APPEALS

8th Div. 75

Phillip Luther

vs.

State of Alabama

Appeal from Marshall Circuit Court

IT IS ORDERED that the application for rehearing be and the same is overruled.

STATE OF ALABAMA
COUNTY OF MONTGOMERY

I, Louise L. Holt, Assistant Clerk of the Court of Criminal Appeals, do hereby certify that the foregoing pages contain a full, true and correct copy of this Court's opinion, judgment of affirmance and ruling on application for rehearing in the cause of 8th Div. 75, Phillip Luther v. The State of Alabama, as the same appears and remains on file and of record in this office.

Witness my hand with the Seal of the Court attached, this the 11th day of July, 1972.

Assistant Clerk of the Court of
Criminal Appeals of Alabama

MARCH 30, 1972

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1971–72

8th Division 476

Ex Parte: Phillip Luther, Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Phillip Luther v. State of Alabama)

Comes the petitioner, and the Petition for Writ of Certiorari to the Court of Criminal Appeals being submitted and duly examined and understood by the Court, it is considered and ordered that the Petition for Writ of Certiorari to the Court of Criminal Appeals be, and the same is hereby, denied, and the petition be, and the same is hereby, dismissed at the cost of the petitioner, for which cost let execution issue.

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, hereby certify that the above is a true and correct copy of the judgment of the Supreme Court of Alabama in the cause of 8th Div. 476, Ex Parte: Phillip Luther, Petitioner, entered in this cause on March 30, 1972.

WITNESS: J. O. Sentell, Clerk of the Supreme Court of Alabama, with the Seal of the Court attached, at the Judicial Department Building, in the City of Montgomery, this the 11th day of July, 1972.

J. O. Sentell

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE COURT OF CRIMINAL APPEALS OF ALABAMA
OCTOBER TERM 1972–72

To the Clerk of the Circuit Court
of Marshall County – Greeting:

Whereas, in the matter of Phillip Luther, Appellant, vs. State of Alabama, Appellee, recently pending in the Court of Criminal Appeals of Alabama, on appeal from the said Circuit Court of Marshall County, our Court of Criminal Appeals did on the 11th day of January, 1972, render a judgment of affirmance in said cause; and,

Whereas, a certificate of such action of the Court of Criminal Appeals was duly issued to you, and thereafter an application for a rehearing of said cause was overruled in this Court on the 8th day of February, 1972; Certiorari denied by Supreme Court on March 30, 1972; Stay of 90 days granted by Court of Criminal Appeals on April 17, 1972;

Now, it is hereby certified, that our Court of Criminal Appeals, or one of the Judges thereof, did, on the 17th day of April, 1972, order that the said certificate be recalled. And you will accordingly return the same to this office at once, together with copy of the opinion in said cause issued to you.

Witness, Mollie Jordan, Clerk of the Court of Criminal Appeals of Alabama, at the Capitol, this the 17th day of April, 1972.

Mollie Jordan, Clerk of the Court
of Criminal Appeals of Alabama.

FILE COPY

FILED
AUG 9 1972
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 72-99

PHILLIP LUTHER,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

WILLIAM J. BAXLEY
Attorney General of Alabama

DAVID W. CLARK
Assistant Attorney General
of Alabama

Counsel for Respondent

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BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINIONS OF THE COURT BELOW

The opinion of the Court of Criminal Appeals of Alabama is reported as follows:

Phillip Luther v. State of Alabama, 8th Division, 75, 259 So. 2d 857. Certiorari was denied, 259 So. 2d 862.

II

JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the judgment of the Court of Criminal Appeals of Alabama rendered on January 11, 1972. Application to the Court of Criminal Appeals of Alabama for rehearing was denied on February 8, 1972. A petition to the Supreme Court of Alabama for writ of certiorari was denied on March 30, 1972. Petitioner applies under the provisions of Title 28, Section 1257(3), United States Code.

III

QUESTION PRESENTED

Does the use of special prosecutors, as Assistants to the District Attorney, violate rights of defendant as to due process of law, there being no objection thereto at trial, on motion for new trial or on appeal?

IV

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the Constitution of the United States, Section 1.

V

STATEMENT

Petitioner Phillip Luther, a white man, was convicted in the Circuit Court of Marshall County, Alabama, Albertville

Division, of second degree arson and sentenced to four years imprisonment.

VI

SUMMARY OF ARGUMENT

Use of special prosecutors as Assistants to the District Attorney, with District Attorney being present at trial, does not violate any constitutional rights of accused, particularly if there was interposed no objection at trial, on the motion for new trial or on appeal.

VII

ARGUMENT

The record does not support the petitioner's claim.

It is essential to the jurisdiction of this Honorable Court that a substantial federal question have been properly raised in State court proceedings. And, while a petitioner is not bound to follow any particular form of words or phrases, it is essential that he bring the federal claim and the grounds therefor to the State court's attention with fair precision.

In *Oxley Stave Co. v. Butler County*, 166 U. S. 648, 655, it was stated that "the jurisdiction of this court to reexamine a final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert such a Federal right."

Actually, the only mention of Mr. Clark Johnson's being Eddie Scott's attorney was as follows:

"Q. Did you contact any attorney?

"A. Yes, sir.

"Q. Who was your attorney?

"A. Mr. Johnson.

"Q. Mr. Johnson is your attorney?

"A. Yes, sir.

"Q. And what charges have been placed against you, if any?

"A. Second degree arson.

"Q. Have you been indicted by the grand jury?

"A. No sir.

"Q. You haven't appeared before them and you weren't indicted?

"A. No, sir." (R. p. 71)

* * * * *

On argument to the jury:

"Mr. Floyd: Eddie Scott went down to the police station when they told him he was under arrest, and he took his lawyer, Mr. Clark Johnson, with him.

"Mr. Johnson: We object to that, Your Honor. There is no evidence of that.

"The Court: Sustained." (R. p. 220)

* * * * *

On amendment to motion for new trial:

"44. The Court erred in sustaining the State's objection to the following statement made by Defendant's counsel in closing argument to the jury:

"Eddie Scott went down to the police station when they told him he was under arrest, and he took his lawyer, Mr. Clark Johnson, with him." (R. p. 23)

The sustaining of the State's objection was correct as Eddie Scott had testified on Record Page 70 that he took his grandfather with him to the police station.

In argument to the jury the rule is that an attorney cannot be allowed to state anything as a fact to which there is no evidence. *Johnson v. State,* 272 Ala. 633, 133 So. 2d 53. Volume 6A, Alabama Digest, Criminal Law, Section 719(1).

As can be seen from the testimony of Eddie Scott, he testified as to his part in the crime. He had not been indicted and the record shows no promise by the State to grant him any immunity.

There was no objection made at trial, on motion for a new trial, or on appeal to the appearance of Mr. Clark Johnson or Mr. Terry Huffstuttler, Jr., as special prosecutors. The District Attorney, Mr. H. H. Conway was present at trial. Hence, the matter was not presented in State courts on trial or appeal.

The use of special prosecutors is not violative of defendant's rights as to due process of law.

In the case of *Alonzo v. State Ex Rel. Booth*, 283 Ala. 667, 219 So. 2d 858, cert. denied 396 U. S. 931, 90 S. Ct. 269, 24 L. Ed. 2d 229, the matter was discussed as follows:

> "Special counsel may appear in the prosecution as an assistant to the solicitor and with the consent of the court. The management of the case remains with the official representative of the state, in whose name the special counsel appears. The consent of the state is all the authority needed by special counsel; hence, a motion by defendant to require special counsel to show his authority is properly overruled. Handley v. State, 214 Ala. 172, 174, 106 So. 692, 694."

Respondent submits that use of the special prosecutors was not error. First, no federal question was raised in the State courts and secondly, use of special prosecutors is not violative of due process.

VIII

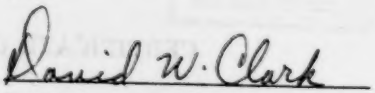
CONCLUSION

For the foregoing reasons, respondent submits that petitioner was indicted, tried and sentenced properly and that the constitutional rights of said petitioner were not violated. Therefore, the writ of certiorari should be denied.

Respectfully submitted,

William J. Baxley

WILLIAM J. BAXLEY
Attorney General of Alabama



DAVID W. CLARK
Assistant Attorney General
of Alabama

250 Administrative Building
Montgomery, Alabama 36104

Counsel for Respondent

IX

CERTIFICATE OF SERVICE

I, David W. Clark, one of the attorneys for respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of August, 1972, I served three copies of the foregoing brief and argument of respondent in opposition to petition for writ of certiorari upon the attorneys for petitioner, by mailing said copies in a duly addressed envelope to said attorneys of record as follows:

Arthur Parker, Esq.
J. Louis Wilkinson, Esq.
Jack Bonner, Esq.
210 Frank Nelson Building
Birmingham, Alabama 35203.

David W. Clark

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